SOUTHWEST RESEARCH AND INFORMATION CENTER
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September 7, 2004

Steve Zappe
New Mexico Environment Department
2905 Rodeo Park Drive, Building 1
Santa Fe, NM 87505

RE: DOE High-Level Waste WIPP Permit Modification request

Dear Steve:

Southwest Research and Information Center (SRIC) has strongly opposed high-level waste (HLW) storage or disposal at the Waste Isolation Pilot Plant (WIPP) for about 30 years. HLW is extremely dangerous and should not ever be allowed at WIPP. Further, HLW is prohibited by federal law for storage or disposal at WIPP.

SRIC has strongly supported the agency-initiated modification related to restricting wastes that can come to WIPP. Therefore, SRIC is pleased that in their permit modification request, the permittees have dropped their opposition to a permit modification that would prohibit high-level waste at WIPP.

However, the permittees' permit modification request cannot be approved because it does not meet the requirements of the New Mexico Hazardous Waste Act (HWA) regulations 20 NMAC 4.1.900 (incorporating 40 CFR 270.42(b)). The modification request is substantially incomplete, does not protect public health and the environment, and is not properly a class 2 modification request. Thus, the New Mexico Environment Department (NMED) cannot approve the permit modification. Under the regulations, NMED can either deny the request (40 CFR 270.42(b)(6)(i)(B) or 270.42(b)(6)(ii)(B)) or determine that the request must follow class 3 modification procedures (40 CFR 270.42(b)(6)(i)(C) or 40 CFR 270.42(b)(6)(ii)(C)).

The permit modification request is substantially incomplete.
Under the HWA regulations (20 NMAC 4.1.900 (incorporating 40 CFR 270.42(b)(1)(iii)), the modification request must explain why the modification is needed. While the permittees have two paragraphs on page 2 of the request that purport to address the need, what the permittees have done is to explain that the request is submitted because of the Hearing Officer's order of June 3, 2004, related to the agency-initiated modification. Those two paragraphs are not an explanation of why the modification is needed.

The modification is needed because the Department of Energy (DOE) has 243 high-level waste tanks at three sites – Hanford, WA (177 tanks); Savannah River, SC (51 tanks); and the Idaho National Engineering Laboratory (INEEL), (15 tanks) – that have been managed as HLW for decades but DOE now wants to "reclassify" or rename some of the waste to call it transuranic and ship that waste to WIPP. The permit modification is needed to protect public health and safety and to clearly impose a prohibition on such renamed HLW from coming to WIPP.

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The permit modification is needed to comply with federal law, although the request is incomplete because it does not mention that need. Federal law is clear that HLW is prohibited at WIPP. The WIPP Land Withdrawal Act ((LWA) Public Law 102-579, as amended by Public Law 104-201) expressly prohibits high-level waste or spent nuclear fuel at WIPP. Section 12 states:

> BAN ON HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL. The Secretary [of Energy] shall not transport high-level radioactive waste or spent nuclear fuel to WIPP or emplace or dispose of such waste or fuel at WIPP.

Both House and Senate land withdrawal bills (HR 2637 and S. 1671) contained a provision banning high-level radioactive waste at WIPP. The bans are discussed in the four committee reports issued regarding those bills. There were three House committee reports (H. Rept. 102-241 Part 1 (Interior and Insular Affairs), Part 2 (Armed Services), and Part 3 (Energy and Commerce) and Sen. Rept. 102-196 (Energy and Natural Resources).

The Senate Report provides the most detail about the HLW ban. It states:

> [subsection] prohibits receipt of any high-level radioactive waste at WIPP. This section would revoke the authority of the Secretary to conduct experiments with high-level radioactive waste under Section 213 of Public Law 96-164. Section 213 of Public Law 96-164, and the accompanying Conference Report (Report 96-702), set forth the mission of WIPP to include temporary storage and experiments on defense high-level radioactive waste. DOE's program plans for WIPP initially included experiments on a limited quantity of defense high-level radioactive waste. DOE has since determined, however, that it will not conduct high-level radioactive waste experiments at WIPP. S. Rept. 102-196 at 28. See also *id.* At 47.

Further, the Senate Report background discussion of the legislation provides some history and description of transuranic waste. The discussion states: "Prior to 1970, transuranic waste was placed in shallow land burial as low-level radioactive waste." at 16. Thus, since the waste was placed in the tanks, not shallow land burial, and much of the tank waste was created before 1970, the committee did not consider those wastes to be transuranic waste. Indeed, since the passage of the Nuclear Waste Policy Act (Public Law 97-425) in 1982, Congress and the public understood that the HLW in the tanks would be disposed of in a geologic repository or repositories.

The House Energy and Commerce Committee report states: "Prior to 1970, transuranic waste was routinely buried in shallow trenches near defense production facilities." H. Rept. 102-241, Part 3 at 13. Again, waste that was placed in tanks was not considered to be transuranic. The House Armed Services Committee used similar language to the Senate report: "In the early years of the nuclear weapons program, transuranic wastes were placed in shallow land burial as low-level waste, and approximately 192,000 cubic meters was disposed of in this fashion. H. Rept. 102-241, Part 2, at 13-14. Once again, the committees understood that wastes in tanks were not considered to be transuranic. None of the committees understood that HLW tank wastes or spent fuel sludges could come to WIPP, nor did DOE propose that such wastes would be disposed at WIPP during the five years of debate on the LWA.

In debating the LWA, Congress was aware of DOE's own historic statements about the WIPP inventory of what wastes could come to WIPP. The original *Final Environmental Impact Statement (FEIS) Waste Isolation Pilot Plant* DOE/EIS-0026, October 1980, did not include any of the Hanford, SRS, or INEEL tank waste or spent nuclear fuel sludges. The inventory was "the readily retrievable waste expected to be stored in Idaho through 1990....In addition, the WIPP

would be designed to accommodate all defense TRU waste generated between 1990 and 2003." at 2-18.

The 1981 DOE Record of Decision on the FEIS stated:

> The WIPP facility will dispose of defense transuranic (TRU) waste stored retrievably at the Idaho National Engineering Laboratory (INEL). By approximately 1990 all existing waste stored at INEL will have been removed to WIPP, and the WIPP facility would be in a position to receive and dispose of TRU waste from other defense waste generating facilities. 46 *Federal Register* 9162 (January 28, 1981).

That Record of Decision also called for:

> Conducting experiments on defense wastes, including small volumes of defense high-level waste. The high-level waste used for experiments will be retrieved and removed from the site prior to decommissioning of the WIPP facility. *Id.*

The FEIS analysis of HLW for experiments was based on "a reference experimental waste" from SRS. at 5-8.

The 1990 *Final Supplement Environmental Impact Statement Waste Isolation Pilot Plant*, DOE/EIS-0026-FS, January 1990 eliminated the high-level waste experiments. at 3-4. The inventory includes no waste from any HLW tanks or spent nuclear fuel sludges. at 3-2 to 3-6.

As noted above, in the LWA, Congress clearly withdrew any authority for HLW experiments at WIPP and prohibited HLW and spent nuclear fuel storage and disposal.

Even in the third WIPP FEIS, which includes "additional inventory" of some wastes that are explicitly not approved for WIPP, no tank wastes (or spent fuel sludges) are included in that additional inventory. *Waste Isolation Pilot Plant Disposal Phase Final Supplemental Environmental Impact Statement*, DOE/EIS-0026-S-2, September 1997, at 2-7, A-9.

In accordance with the LWA, the WIPP permit states that the facility is for "management, storage, or disposal of TRU mixed waste." Module I.D.2. The permit also provides that TRU waste does not include "high-level radioactive waste." Module I.D.5.

However, the permit does not explicitly address the current situation in which DOE might rename HLW and bring it to WIPP. Nor does the permit address spent nuclear fuel or spent nuclear fuel sludge. Thus, the permit modification is needed to address the DOE's changed policy. Insofar as that policy is based on the DOE "Waste Incidental to Reprocessing" policy, that policy has been found to be contrary to law by a federal court. Natural Resources Defense Council v. Abraham, 271 F.Supp.2d 1260 (D. Idaho 2003). DOE has appealed that decision to the 9th Circuit Court of Appeals.

The modification request is incomplete because it does not delineate, list, or otherwise identify the "tanks that ha[ve] ever been managed as high-level waste." Since the permittees know which tanks have ever been managed as HLW, they should, at a minimum, include such a listing in the request so that there would be no ambiguity about which tanks are included (and any tanks that are not included) in the modification request. SRIC pointed out this deficiency in the request before it was submitted, but the permittees did not provide such a list.

The list of all 243 tanks is Attachment 1. The listing comes from various DOE documents. By way of explanation, comments from some citizens on the modification request may mention 239 tanks, rather than the 243 tanks that are included in the attached list. Since SRIC may have been the source of the 239 tanks number, we want to explain the two numbers. DOE has said in documents that there are 177 tanks at Hanford, 51 at SRS, and 11 at INEEL, for a total of 239. However, during its continuing research for these comments, SRIC found that the *Idaho High-Level Waste & Facilities Disposition Final Environmental Impact Statement*, DOE/EIS-0287, September 2002, adds four additional, smaller (30,000 gallon) waste tanks to the eleven larger (300,000 gallon) tanks in the INEEL HLW Tank Farm. at 2-10. Thus, SRIC believes that those 15 tanks at INEEL also should be included in any tank waste permit modification.

Regarding whether all of those tanks have been managed as HLW, numerous DOE documents so state, in addition to the WIPP LWA legislative history that has already been cited. For example, *Linking Legacies: Connecting the Cold War Nuclear Weapons Production Processes To Their Environmental Consequences*, DOE/EM-0319, January 1997, referring to Hanford HLW, states:

> At Hanford, high-level waste alkaline liquid, salt cake, and sludge are stored in 149 single-shell underground tanks and 28 double-shell underground tanks. Some transuranic waste and low-level waste is also stored in the tanks but <u>all tank waste is classified at Hanford and managed as high-level waste</u>. at 35, <u>emphasis added</u>, see also at 33.

That same document describes the HLW tanks at SRS and INEEL. at 37-38.

DOE's Integrated Data Base Reports consistently state that the waste in the Hanford tanks is managed as HLW. For example,

> Hanford single-shell tank wastes (i.e., liquid, sludge, and salt cake) and double-shell tank wastes (i.e., slurry) consist of HLW, TRU wastes, and several LLWs. However, in storage practice, all tanks are managed as if they contain HLW. Thus, their contents are included in the HLW inventory. *Integrated Data Base Report – 1992: U.S. Spent Nuclear Fuel and Radioactive Waste Inventories, Projections, and Characteristics*, DOE/RW-0006, Rev. 8, October 1992, at 55.

That same document includes two pages of diagrams showing how HLW at Hanford, INEL, and SRS will be stored treated and disposed. Each of the diagrams show the wastes being disposed "in HLW geologic repository." at 45-46. This document was issued about the same time that the LWA was passed.

Four years later, the *Integrated Data Base* stated:

> At Hanford, waste in single- and double-shell tanks consist of HLW, TRUW, and several LLWs. However, in the interim storage mode, the tanks are managed as if they contain only HLW. Thus, their contents are included in the HLW inventory. *Integrated Data Base Report – 1995: U.S. Spent Nuclear Fuel and Radioactive Waste Inventories, Projections, and Characteristics*, DOE/RW-0006, Rev. 12, December 1996, at 33.

In *A Report to Congress on Long-Term Stewardship*, DOE/EM-0563, January 2001, DOE stated:

> The chemical processing of irradiated fuels generated the largest volume of Hanford's waste. The process wastewaters were divided into high-level radioactive alkaline slurries containing heavy metals, organic and inorganic salts; uranium, plutonium, and mixed fission products stored in underground waste tanks; and low-level waste streams, such as cooling water, condensates, and other similar waste discharged to the ground. Most of the high-level waste remains in underground storage tanks and will be removed from the tanks and treated in the proposed Waste Processing and Immobilization Facility. Volume II, at Washington 11. [Note that there is no mention of TRU waste.]

Regarding SRS, the *Report to Congress* states:

> About 132 million liters (35 million gallons) of high-level waste are stored in waste tanks at SRS. DOE is working to remove the high-level waste from 49 remaining tanks and stabilize and close the tanks. Two have already been closed. at South Carolina 9. [Note that there is no mention of TRU waste.]

In its *Transuranic Waste Baseline Inventory Report (Revision 2)*, (TWBIR) DOE/CAO-95-1121, December 1995, DOE stated:

> Another category of possible future TRU waste is from Hanford site. The tank wastes at Hanford can be classified as high-level wastes (HLW), transuranic (TRU) wastes, or low-level (LLW). For purposes of receipt, storage and management, all tank waste are managed as HLW. at 5-8.

The TWBIR also included West Valley, New York HLW tanks and TRU waste from WIPP because it is commercial waste. at 5-1. All commercial waste, including TRU waste also is prohibited by the LWA. Given that DOE apparently is not currently proposing to send HLW tank waste from West Valley, SRIC is not advocating that those tanks also be included in the permit modification. However, SRIC would not object to those West Valley tanks being added to the 243 tanks included in the modification, should NMED choose to do so.

The factual history that DOE did not consider sending tank wastes to WIPP is further confirmed by top level DOE officials. Then DOE Assistant Secretary for Environmental Management Jessie Roberson, who wrote to the *Albuquerque Journal* on October 25, 2003 that "the department's official view that some of the material currently in the tanks is transuranic waste that qualifies for disposal at WIPP dates back at least to December 1999." Attachment 2.

Spent fuel also is prohibited by Section 12 of the LWA. In addition to tank wastes, in DOE's new WIPP inventory for the Environmental Protection Agency Recertification of WIPP, DOE has included two new waste streams that are not included in the TWBIR and are not TRU waste. Those waste streams are K-Basin sludges, RL-W445 and RL-W446. *Title 40 CFR Part 191 Subparts B and C Compliance Recertification Application 2004*, DOE/WIPP 2004-3231, Appendix DATA, Attachment F, Annex J at J-RL-129 to J-RL-132. The permit modification request should have included a discussion of whether such spent fuel sludges were included, something that SRIC requested before the request was submitted to NMED. However, the permittees have not addressed that issue, another example of the request being incomplete.

The K-Basin sludges have always been managed as spent nuclear fuel. In the 1996 "Record of Decision: Management of Spent Nuclear Fuel From the K Basin at the Hanford, Site, Richland, WA," DOE specifically stated that "sludge will continue to be managed as spent nuclear fuel." 61 *Federal Register* 10740 (March 15, 1996). While that ROD stated that some "non-SNF debris from the basins" could be disposed of as low-level waste (61 *Federal Register* 10738), none of the materials in the basins were considered to be TRU waste. Indeed, a recent DOE contractor report that discussed disposition options for the sludges at WIPP continues to identify the wastes as "spent-nuclear-fuel sludge in the K-Basins at the Hanford Site." *Disposition Options for Hanford Site K-Basin Spent Nuclear Fuel Sludge*, PNNL-14729, January 2004 at 1.1.

The modification request is incomplete and inadequate in that it does not contain additional required changes in the permit to ensure implementation and compliance with the prohibition. For example, the request contains no change in Permit Attachment B related to the Waste Stream Profile Form (WSPF) and the WIPP Waste Information System (WWIS). The WSPF should be revised to indicate whether waste has ever been managed as high level waste. The WWIS should

be changed to include fields regarding whether each container contains any waste that has ever been managed as HLW or spent nuclear fuel. The WWIS should also ensure that any waste stream from the 243 tanks or the spent nuclear fuel sludges would be rejected for shipment to WIPP. The request includes no change in Permit Attachment B4 regarding Acceptable Knowledge (AK), although AK requirements would need to be changed to determine whether the waste stream included any waste that had ever been managed as high-level waste, whether the waste stream contained any waste had ever been stored in any of the 243 tanks, whether the waste stream contained any waste had ever been stored in spent nuclear fuel basins, whether the waste stream contained any waste that had ever been managed as spent nuclear fuel.

Given the prohibition on HLW storage or disposal at WIPP, the modification request is incomplete because it does not explain why the request includes the language: "unless specifically approved through a subsequent class 3 permit modification." The request contains no basis for any such language. SRIC believes that such a provision is unnecessary – permit conditions can be changed through the class 3 modification process – and contrary to law because HLW is prohibited at WIPP.

Similarly, the request is incomplete because it does not explain what criteria would be used in determining the approval for any wastes in the subsequent Class 3 permit modification. Any permit modification, class 3 or otherwise, that would allow HLW or other waste prohibited by federal or state law is contrary to the HWA and its regulations. Such a modification could not be approved.

The request is also incomplete because it does not specify whether all tank waste is considered mixed, and if not, which waste is mixed and which is non-mixed. DOE has long stated that HLW also is mixed waste. For example,

> High-level waste contains hazardous constituents regulated under Subtitle C of the Resource Conservation and Recovery Act. *Estimating the Cold War Mortgage: The 1995 Baseline Environmental Management Report.* DOE/EM-0232, March 1995, Volume I, at 2.10.
>
> Much of the Department's high-level waste also is either known or presumed to contain hazardous constituents subject to regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA) and is regulated as mixed waste. *Linking Legacies* at 33.
>
> HLW is also a mixed waste because it contains hazardous constituents that are regulated under RCRA. *Final Waste Management Programmatic Environmental Impact Statement For Managing Treatment, Storage, and Disposal of Radioactive and Hazardous Waste*, DOE/EIS-0200-F, May 1997, Volume I, at I-27.

Thus, based on the available information, SRIC believes that all the wastes in the 243 tanks are mixed waste.

<u>The modification request does not protect public health and the environment</u>.
It is undisputed that HLW and spent nuclear fuel sludges are extremely dangerous. Thus, proper management of HLW and spent nuclear fuel sludges is essential to protecting public health and safety. In the case of WIPP, the dangers of HLW and spent nuclear fuel sludges preclude their storage or disposal at WIPP. Yet, the permittees' modification request could allow HLW, once it is renamed, to come to WIPP. Allowing HLW at WIPP is both contrary to law and would not protect public health and the environment.

The modification request is not properly classified as a class 2 modification.
HWA regulations, 20 NMAC 4.1.900 (incorporating 40 CFR 270.42(b)(6)(i)(C) and 40 CFR 270.42(b)(6)(ii)(C)) provide that NMED may follow class 3 modification procedures if there is significant public concern about the proposed modification or because of the complex nature of the request. Those conditions are present regarding this request. The hundreds of people who have sent in cards or comment letters and the dozens of organizations who have submitted comments show the significant public concern about the request. While the simplicity of the SRIC proposed modification language and its basis might not be considered complex, the current permittees' request is complex because of its ambiguity, lack of detail, and incompleteness.

If NMED does not deny the permit modification request, it should proceed with a revised permit modification.

SRIC supports an approved tank waste permit modification that states:

> II.C.3.i. Tank waste – TRU mixed wastes from tanks that have ever been managed as high-level waste is not acceptable at WIPP.

In addition, given the DOE's proposal to send K-Basin spent fuel sludge to WIPP, SRIC also supports an additional version of the permit modification:

> II.C.3.i. Tank and sludge waste – TRU mixed wastes from tanks that have ever been managed as high-level waste is not acceptable at WIPP. TRU waste from spent-nuclear-fuel sludge is not acceptable at WIPP.

Any modification should also include changes in Attachment B regarding the WSPF and WWIS to ensure that they identify and reject any waste that had ever been managed as HLW or spent nuclear fuel and that any of the waste streams from the 243 tanks and the spent nuclear fuel basins are rejected and not allowed to be shipped to WIPP. Any modification should also require changes to Permit Attachment B4 regarding acceptable knowledge to ensure that any waste from the 243 tanks and spent nuclear fuel sludges are identified and prohibited from being sent to WIPP.

Thank you very much for your consideration of these comments.

Sincerely,

Don Hancock

HANFORD – 177 TANKS

ATTACHMENT 1

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SAVANNAH RIVER SITE – 51 TANKS

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IDAHO NATIONAL ENGINEERING LABORATORY – 15 TANKS

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Attachment 2

DOE Isn't Changing WIPP Disposal Level

BY JESSIE ROBERSON
U.S. Department of Energy

Your editorial "DOE Can't Relabel Way Out of Waste Box" mischaracterizes the Department of Energy's intentions.

I would like to assure you that the department does not plan to dispose of high-level waste at the Waste Isolation Pilot Plant. The department continues to prepare high-level waste for disposal in a geologic repository for spent nuclear fuel under the Nuclear Waste Policy Act.

At our Idaho facility, the department has already solidified high-level wastes into powdered calcine. At Hanford, we are planning to vitrify the high-level tank waste in the Waste Treatment Plant currently under construction.

At the Savannah River Site, we are currently vitrifying high-level tank waste into canisters, and we have already completed vitrification at our West Valley, N.Y., site.

There is nothing new about the proposition that certain waste currently in the tanks, which is not derived from the first cycle of reprocessing, is not high-level waste. Nor is there anything new about the idea that some of this material is transuranic waste that, in solid form, would qualify for disposal at WIPP.

Neither of these views are the invention of this administration. Instead, both are longstanding views firmly rooted in the core principle of waste classification, which is that waste should be classified and disposed of according to the risk to human health and safety that it presents.

The distinction between the untreated highly radioactive first-cycle liquid waste which are high level waste, and other reprocessing wastes, which are 10,000 times less radioactive, dates back at least to 1969.

At that time, the Atomic Energy Commission first defined "high level waste" to include the former but not the latter. Moreover, the department's official view that some of the material currently in the tanks is transuranic waste that qualifies for disposal at WIPP dates back at least to December 1999.

The draft Environmental Impact Statement for the Idaho tank farms, issued at that time, makes clear DOE's view that the liquid waste currently in the Idaho tanks, which consists almost entirely of later-cycle reprocessing material and other waste streams derived from on-site cleanup activities, is transuranic.

The draft EIS goes on to evaluate numerous options for disposing of this waste at WIPP in different possible configurations. The final EIS, issued in July 2002, is not significantly different from the draft either in the way it classifies this material or in its consideration of options for disposing of this material at WIPP.

Finally, the department is not seeking to send any waste to WIPP that does not meet the WIPP waste acceptance criteria.

To the contrary, the department will continue to comply with all WIPP limitations, including the acceptance criteria themselves, rem and curie limits on remote-handled transuranic waste, restrictions on the weight percent of plutonium that may be sent to WIPP, and volume limits on the amount of waste emplaced in the facility.

The department is not seeking to change any of these requirements or limitations or to obtain authority that would allow it to go beyond the kinds of options for WIPP disposal of tank wastes that the department examined in 1999.

Jessie Roberson is assistant secretary for Environmental Management for the U.S. Department of Energy.